Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

77-1602

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

October Term

Case No. ____

HUGH R. JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OF COUNSEL:
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IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

Case No. _____

HUGH R. JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

To: The Chief Justice, and the Associate Justices of the Supreme Court of the United States of America.

Comes now, Hugh R. Johnson, Petitioner Pro Se who petitions this court to issue a writ of certiorari to the Court of Appeals for the Tenth Circuit.

As grounds, the Petitioner Johnson shows the court as follows:

I.

OFFICIAL AND UNOFFICIAL
REPORTS OF OPINION

The unofficial report of the opinion of the Court of Appeals For The Tenth Circuit in U.S. v Johnson, was decided and filed March 22, 1978, Case No. 77-1366, is attached hereto as Appendix A.

To Petitioner's knowledge there has been no unofficial report made of the denial of petitioner's 'Denial of Rehearing' filed on _____, 1978, the order of the court of appeals is attached hereto as Appendix B.

II.

JURISDICTIONAL STATEMENT

Jurisdiction is obtained under Amendment I of the United States Constitution, the right to petition the government for redress of grie-

vance and Amendment IX, the right to have the issuance of a writ of certiorari under the common law.

Jurisdiction is further obtained under statutory law as set out in 28 U.S.C._____ allowing the Supreme Court to make their own rules, Rule 19 is involked requiring the courts power of supervision over the Court of Appeals when such court has rendered a decision in conflict with the decision of another court of appeals on the same matter and has decided an important question of federal law which has not been, which should be, settled by this court: and has decided a federal question in a way in conflict with applicable decisions of this court; and has so far departed from the acceptance and usual course of adjudication of judicial proceeding, or so far sanctioned such a departure by the District Court.

III.

JUDGEMENT TO BE REVIEWED

The judgement to be reviewed was decided March 22, 1978 by the U. S.

Court of Appeals for the Tenth Circuit upholding a charge of five counts of filing a false withholding exemption certificate with his employer during the period of 74 and 76 contrary to Section 7205, a judgement of the lower court was affirmed, see attached Appendix A.

The order denying Petitioner's 'Motion For Rehearing' is dated April 10, 1978 and it is attached hereto as Appendix B.

IV.

QUESTIONS PRESENTED FOR REVIEW

A. TENDER FOR DEBT AND PAYMENT OF DEBT

Whether the court below erred in not instructing the jury of the difference between payment of debt and tender for debt and whether Petitioner can be compelled to operate in an equity jurisdiction which violated his rights at law and whether the compulsion would amount to a denial of due process.

B. ASSISTANCE OF COUNSEL

Whether the court below erred in not allowing petitioner the common law right to plead by proxy and whether the court has authority to deny petitioner the common law right to plead by proxy and whether the court erred in forcing petitioner to seek licensed attorney-at-law who was incompetent.

C. JURY SELECTION

Whether the jury selection process is discriminatory and whether the court erred in not demanding that the jury selection follow the criteria of selecting a fair cross-section of the community which is in violation of 28 U.S.C. 1867.

D. WILLFULNESS

Whether the court below failed to instruct the jury as to the proper law on willfulness as to the affect of the Bishop case.

STATEMENT OF THE CASE

An indictment was filed on October 15, 1976, charging Petitioner with five (5) counts of willfully filing a false withholding exemption certificate (W4-E) with his employer.

Appellant was arraigned on November 19, 1976, at which time a plea of not guilty was entered.

Various motions were filed and a two (2) day jury trial of twelve (12) was held on the 22 and 23 days of December, 1976, at which a guilty verdict was returned.

Appellant filed a timely notice of appeal on January 4, 1977. in which he seeks review of the judgement rendered on December 30, 1976, which was a jail sentence of four (4) months for Count I; and 500.00 dollars ($) fine for each of Counts II III, IV, and V for a total of 2000.00 dollars ($).

Arraignment was held and the judge through trickery sought to have petitioner waive his right to counsel. Although petitioner never intelligently waived his right to counsel the District Judge deprived him of the right to plead by proxy.

Since the judge, chancellor, deprived petitioner the common law right to plead by proxy, petitioner sought Supreme Court's created noble -- known to the general public as an attorney.

The attorney talked a good story but fell quite short of being a competent defense counsel.

Numerous motions were filed by the attorney and said motions were disgracefully absent proper briefs to back up the points set out in the motions.

ARGUMENTS

ARGUMENT I

TENDER FOR DEBT AND PAYMENT OF DEBT AND DUE PROCESS OF LAW

Petitioner is a common law worker exercising his right to exist at common law, and as a result is not a "person" required by the statute to file or pay a tax under the 16th Amendment of the U.S. Constitution, and does not willingly exercise or use a benefit of a franchise or privilege which would subject him to the chancellor-dictatorship which was pretending to be a judge-at-law in petitioner's trial.

The income tax is an excise tax on a privilege and the carrying on of business in a legislative franchised manner. *Brushaber v. Union Pacific, 204 US 1.*

If petitioner has been placed into a corporate or law merchant jurisdiction. it has been done so without his knowledge and consent, and would be violative of the due process clause of the 5th and 14th Amendments to the Federal Constitution.

The court below refused to consider that income made in a common law occupation conveys title at law to the common law worker (petitioner) therefore, the equity tax does not attach to that property as a matter of law.

The incompetence by which petitioner finds his licensed counsel is proven by the fact that he did not even know the above described description of the equity law merchant.

The argument that jurisdiction could attach due to dealings in negotiable instruments is wholly without merit since petitioner is compelled to receive checks drawn on demand deposits and does not as a practical matter, voluntarily surrender any rights at law

The apparent attempt to establish an equity jurisdiction upon petitioner founded in his compulsion to due business in demand deposits is contrary to the 5th Amendment to the Federal Constitution (compelled to testify).

The simple fact that petitioner was unknowing of the fact and that licensed counsel failed to apprise petitioner of that fact renders the total subject highly suspect of constituting denial of due process and

should allow for further briefing on the subject.

The ludicrous, indecent and immoral persecution of the law by the abolishment of distinction between law and equity is an indecent violation of due process in itself. But compelling the petitioner by trickery and deception to engage in equity law merchant by either the use of demand deposits or negotiable private bank notes, thereby compelling him to abandon his rights at law in a diabolical scheme of plunder of such magnitude it renders the common thief a lily white saint.

The court below in their holding did not even address themselves to the above issues maybe because they misinterpreted the meaning of petitioners brief, and took the position that Federal Reserve Notes are taxable even though the Internal Revenue never publishes a ruling on their fair market value. Petitioner understands the reluctance of their part to undertake such a task because of the continuing day-to-day fluctuation of the notes themselves. However, even if petitioner was exercising a privilege, which would subject him to the

excise tax asked for by the 16th Amendment, he would be unable to compute his tax in dollars until a fair market value was established on Federal Reserve Notes.

Petitioner understands that the courts have stayed away from this subject possibly because of the vast consequences attached to any decision which may interrupte our funny money system.

However, all citizens in these United States are entitled to a full protection of the law, someone, someday must face this issue.

Therefore, petitioner asks this court to decide to hear both sides and render a decision in the above grave matters according to the highest of principles governing a free people in a free society.

ARGUMENT II

Petitioner herein asserts that the court erred in interfering with petitioner's defense when it refused to allow petitioner the right to plead by proxy,which caused petitioner to seek incompetent private enfranchised, noble created by the State Supreme Court, and as a result petitioner was denied competent counsel for his defense and was denied his right to plead by proxy of his choosing.

It is well settled at common law that proxy pleading, for the most part, were not licensed attorneys or equity franchises created by the State, and that common law parties to a controversy had the right to plead by proxy, choosing such proxies they may decide based on their widsom and confidence which they deemed proper.

Petitioner is appalled by the money grabbing State created nobles enfranchised and sanctioned by the State Supreme Court, commonly known to the populace as attorneys at law, who, for the most part are officers of the court, trained and programed to entice and convince the unsuspecting victim to acquiese to a jurisdiction of equity, where-

by the rights of the party pleading is subjected totally to the will of the chancellor .

Justice Burger, himself, can affirm the percentage of licensed attorneys which are incompetent to plead cases at the Supreme Court or otherwise. Yet, the courts and the judiciary continue to arbitrarily force defendants to submit to the plundering by these incompetents, to the detriment and expense of the petitioner.

Petitioner hereby asserts that the so-called law profession has usurped the law belonging to the people and has forced the people into a position of choosing to defend themselves in a complex arena or expend huge sums for what is probably an incompetent and servitude to the incompetent is nothing more than plunder and those who choose not to right this atrocity of justice are nothing more than aiders and abettors.

The Constitution of the State of Wyoming provides in Article I, Section 10, that we have "..the right to defend in person and by counsel, and at the time that provision was written, there was no "bar" association or "licensed' attorneys, and if any restriction on counsel had been intended, it would

have been written into the document.

Further, Section 2 provided that "In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal." This too has been violated by the "bar" association because they have granted themselves "exclusive" privileges in violation thereof.

Hence, under the law of the Constitution of the State of Wyoming it is unconstitutional to deny a litigant his complete and unrestricted choice of counsel, and any type of rule to the contrary is void.

In Texas there are many current instances where unlicensed counsel has gone into court and represented litigant. In Mathes, et ux v Commissioner, Docket No. 4674 76 (US Tax Court - 5/9/77), the petitioner, an unlicensed counsel, was permitted to represent himself and his wife as the attorney of record. Similarly, in the following cases, unlicensed counsel was permitted to assist and represent pro se litigants: US and IRS v Klaumann, Misc. H-77-14 (Houston Texas); US and IRS v Klaumann, Misc. H-77-15 (Houston, Texas); US and IRS v Wisnowski, Misc. H-77-17 (Houston, Texas); US and IRS v Wisnowski, Misc. H-77-18.

In State of Texas v Farnham, No. 466889 County Criminal Court at Law No. 3 Harris County, Texas (1977), an unlicensed counsel twice successfully applied for, argued and was granted the Extraordinary Writ of Habeas Corpus for Norman R. Farnham, who was being unlawfully detained of his liberty. Unlicensed counsel in that matter was threatened with imprisonment for doing so by Justice of the Justice of the Peace Laurence Wayne, Precinct Postiition 2, Harris County, Texas, until the unlicensed counsel energetically informed him of the existence of Vernon's Texas Statutes Annotated, Article 11.12, p 267· "Who My Present Petition: Either the party for whose relief the writ is intended, or any person for him, may present a petition to the proper authority, for the purpose of obtaining relief" (emphasis supplied). The same practice exists for the Federal Courts.

Under state statute, any person may file and argue an Application for Writ of Habeas Corpus for another without being licensed by any governmental agency, for the right to make Application for the Extraordinary Writ of Habeas Corpus exists in both Constitutional and Statutory Law.

Further, there has been a multitude of cases throughout the United States where prisoners acting within the description of Johnson v Avery, 393 US 483 (1969) have clarified for the states that the state cannot prevent a prisoner from preparing legal instruments for other prisoners. The prisoners so acting are unlicensed counsel and have repeatedly had illegal sentences overturned, such sentences usually being the result of representation by "licensed" members of the bar.

Further, in US v Gordon C. Peterson, (USCA-7) January 20, 1977, No. 75-209, the claim that a state could set the conditions for the practice of law in a federal court was overruled, effectively confirming the right of counsel of choice.

Wherefore, petitioner should be allowed to brief his argument and the highest court in the land should right this gross miscarriage of justice, or there will come a time when the people will.

ARGUMENT III

The jury selection process in the District for the State of Wyoming is a national disgrace and the court below erred when it did not reverse petitioner's conviction when he pointed out that ALL of the populous from the vicinity or area where Defendant resides are excluded from the jury selection process.

It needs no volumes of case law to properly notice the court that denial of a fair cross-section of the community which is a prerequisite to a lawful jury under the U.S. Constitution is reversible error.

Petitioner pointed out in his appeal brief that:

"It is highly prejudicial, to swear jurors in such a way as to make them believe they are duty bound to uphold the court instead of their own conscience. Laymen are easily intimidated in a courtroom and the present jurors' oath is in violation of the command of Article VI above-mentioned and is an intimidation of the jury, against Appellant, a criminal Defendant, in favor of the prosecution.

No case law is needed in support of this objection, as the Constitution itself makes the demand and it is sufficient.

The jurors were not sworn according to the law and the trial is therefore void.

The court's instructions to the jurors that it was their duty to follow the instructions as stated by the Court was in error, which the judiciary is reluctant to recognize.

The juror's right to nullification is set forth by the Moylan Court wherein it admitted,

> We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence. US v Moylan, 417 F2d 1002 (1969).

The jurors were misled about the law and such misleading, appears to be the policy of the judiciary, both state and federal, which policy is a violation of Appellant's right to a fair trial and a conscious and knowing deprivation of his constitutional right to due process of law. The Moylan Court went on to say that:

> This is a power that must exist as long as we adhere to the general verdict in criminal cases, for the courts cannot search the minds of the jurors to find the basis upon which they judge.

> If the jury feels that the law under which the defendant is accused is unjust, or that or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision. Moylan, supra.

Appellant is not arguing that the judge cannot instruct on the law. On the contrary, he may indeed instruct on the law as a guide to the jurors, but he may not bind them to his instructions by oath contrary to their own consiciences. The right of nullification, like the Fourth and Fifth Amendments, is of little use, unless people know they have it. A general verdict system, which we have in America, means that the jurors have the right to judge the law as they see it, not as the judge sees it.

> A general verdict is one which the jury pronounce at the same time on the fact and the law, ... Schofield v Baker, et al, 242 F 657, 658 (2) (1917).

Also, the Court's failure to five Defendant's proposed jury instructions was in error.

Finally the jury selection system which is devised in Wyoming is not according to the law in 28 USC 1861 thru 1874 and especially as Appellant had pointed out in his challenge to the jury array (ROA, Vol I, pp 73 and 74)

showing that a factor of 37% discrimination was present at Appellant's trail, and as Appellant pointed out in Salazar et al v US, case 75-1773.

> That if the appellant could show that a group purportedly discriminated from the jury selection process was a cognizable class the absence of those persons on the jury panel was probably a reversible error.

The criteria set in that case was between 10% and 26% and the court indicated that it was not error if it was not over 26%. In this instant action, the factor is close to 37% as demonstrated by ROA, Vol I, p. 74.

If that is not enough, the Court is asked to take judicial notice that the people from the area in which Appellant resides are totally excluded from the jury wheel since there are no trials held in or near his county or division.

The Court is asked to take judicial notice that most of the District of Wyoming is excluded from the jury wheel and the factor of discrimination statewide would be over 50% which should render the trail of Appellant reversible."

WHEREFORE, Petitioner should be allowed to further brief this question with an eventual decision of reversal.

ARGUMENT IV

Whether the court erred in not instructing proper in willful.

The Court of Appeals for the Tenth Circuit and the Ninth Circuit disagree in this area, in that as late as December 30, 1977, the Ninth Circuit overturned a conviction of a misdemeanor for failure to file when the trial court failed to give instructions based on Garner and Cooley was plain error. (US v Ronald Foster and Della Foster, Case No. 76-3733, Ninth Circuit Court of Appeals).

The Court in that case stated:

> "Appellants did claim the Fifth Amendment privilege on their 1970 and 1971 returns. The Appellants sought a jury instruction based upon the Garner case, which the court rejected in favor of a proposed instruction that the court drew from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 35.31, at 158 (1977). (Our court approved that instruction in Cooley v United States (9th Cir. 1974) 501 F 2d 1249, 1253.) The problem is that the district court did not give the instruction to the jury. As nearly as we can ascertain from the record, no one noticed the omission when the jury was instructed. The failure to instruct upon the appellants' defense based on Garner and Cooley was plain error, which survives on appeal despite the absence

> of an appropriate exception in the district court. Accordingly, appellants' convictions on the Section 7203 counts for the years 1970 and 1971 must be reversed."

The Court in this instant case simply stated that, "an act is done willfully if it is done voluntarily, intentionally, and with specific intent to do something the law forbids." That hardly suffices to establish the criteria needed according to Bishop, Garner and Cooley.

Petitioner had filed returns which were introduced into evidence claiming Garner and Sullivan as authority for his declining to answer specific questions on the return see United States v Sullivan (1927), 274 US 259, and Garner v United States, (1976) 424 US 648, and the government tried to point these out as proof of willfulness.

The said fact is that the Tenth Circuit is making new law by their rulings and the Supreme Court should plainly setforth for all circuits the true rule of law on what constitutes willful.

In this present action petitioner's case would be reversed in the Ninth Circuit; however, he has the misfortune of living in the district of the Tenth Circuit.

In United States v Bishop, 412 US 346,

"THE COURT: Now, willfully here has a slightly different meaning. Willfully means simply that the Defendant knew the requirement of telling the truth and intentionally and with a bad purpose didn't tell the truth, told a falsehood, if that be the case.

The good faith does not ocme into this fifth Charge in this sense. There is no such thing as knowingly and intentionally and willfully making a false statement knowing it to be false intending for somebody to rely on it and act in a certain way, thereis no such thing as doing that and being in good faith about it. If a person knows what he is saying is false, and it is not correct in fact, and says it intending for another person to act on it, all the good faith in the world can't make what is false in fact ture. So, in that sense good faith is not included in willfulness in respect of that requirement of the fifth Charge.

Under the facts of the Case, where there was evidence offered by testimony showing his good faith intentions and by exhibits showing his invocation of his Constituitonal protections and his reliance on law - whether they were valid or erroneous, then good faith should have been part of the Judge's instruction."

Petitioner should be afforded the opportunity to further brief this important question of law, therefore, certiorari should be granted.

CONCLUSION

Petitioner has invoked the provisions of Rule 19, Rules of the Supreme Court, to guarantee his enjoyment of rights protected by the Constitution.

This Petition has shown that in Petitioner's case, the Tenth Circuit Court of Appeals:

1. Has rendered a decision on willful in conflict with the Ninth Circuit.

2. Has decided the issue of counsel as an important question of Federal Law which has not been, but should be settled by this Court.

3. Has decided the issue of willfulness in conflict with Decisions of this Court, and,

4. Has compelled Petitioner to a jurisdiction of equity, in violation of Petitioner's right not to be compelled to loose his rights.

5. Has clouded the issue of jurisdiction so that Petitioner was denied his right to due process of law, by chancellor-dictatorship, instead of having a trial at law.

6. Has traded incompetency of counsel for the right to counsel in a perverted theory that one who knows not what the law is can still be considered competent counsel.

7. Has so far departed from the settled practice of justice that the appearance at first sight smokes of despotism and tyranny, much similar to the days of King George and his Star Chamber (the dreaded courts of chancery).

American justice cannot tolerate one rule of law to govern the Prosectuion and a different rule of law to govern the defense. What kind of "Justice" was meted out by the Sixth Circuit Court of Appeals in the Whitsel Case.

The U.S. Supreme Court must issue its writ of certiorari and accept the Case of Hugh R. Johnson for plenary trial reviewing the error in the Court(s) below - the effect of which has been to deprive the Petitioner Johnson of his Liberty as secured by the Declaration of Independence as well as the U. S. Constitution and the Bill of Rights.

Simple justice demands issuance of the writ.

PRAYER

WHEREFORE, Petitioner Johnson prays that the U.S. Supreme Court will issue its writ of certiorari to the U.S. Court of Appeals for the Tenth Circuit.

Hugh R. Johnson

HUGH R. JOHNSON
Petitioner Pro Se

P.O. Box 133
Granger, Wyoming 82934

May 6, 1978

CERTIFICATE OF SERVICE

I, Hugh R. Johnson, certify that I have this 6th day of May, 1978 mailed, three (3) copies of this Petition to the Solicitor General, Department of Justice, Washington, D. C. 20530.

Hugh R. Johnson

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
MAR 22 1978
HOWARD K. PHILLIPS
Clerk

No. 77-1366

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HUGH R. JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court for the District of Wyoming (D.C. No. CR-76-115)

Submitted on the briefs.

Charles E. Graves, United States Attorney, and Toshiro Suyematsu and Lawrence A. Bobbitt, III, Assistant United States Attorneys, for Plaintiff-Appellee.

Hugh R. Johnson, pro se.

Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

Defendant was here charged in five counts with filing false Withholding Exemption Certificates with his employers during the period 1974 and 1976, contrary to § 7205 of the Internal Revenue Code. He was convicted on each of these counts following a trial and was sentenced to four months imprisonment and to a $2,000 fine.

The contentions advanced here are, first, that appellant had no taxable income during the years in question because all of his income was in the form of federal reserve notes, and that these are not actual or real dollars but are merely promises by the United States Government to pay dollars. The promises will not be fulfilled, so the argument goes, because the notes are not convertible into silver or gold, which constitutes the only real money.

Second, that appellant is exempt from paying income tax because his religious belief rejects "false weight," which is his description of paper money not backed by silver or gold.

Third, appellant claims that his constitutional right under the Sixth Amendment was violated because he was not permitted to have a non-lawyer, lay person represent him. A distinct aspect of the third contention is that his retained counsel was incompetent.

Fourth, he maintains that the oath taken by the jurors is not in compliance with Article 6, Clause 3, of the Constitution, which requires all judicial officers to be bound by oath or affirmation to support the Constitution.

Fifth, he contends that the jury panel had a disproportionate number of Cheyenne residents and federal and state employees on it and that this was not a fair cross section of the community.

Finally, the contention is that the court erred in refusing to instruct the jury that in order to find that the appellant had acted willfully, as required by the statute, they must find that he acted with evil intent and bad purpose. It was claimed that the trial court merely defined a willful act as one "done voluntarily and intentionally and with specific intent to do something the law forbids."

We conclude that we must reject all of the arguments and contentions of the defendant-appellant.

The first argument that the federal reserve notes were not pure dollars is frivolous, and this has been so held. See United States v. Wright, No. 77-1021, slip op. at 4 (10th Cir. Feb. 13, 1978); United States v. Whitesel, 543 F.2d 1176, 1180-81 (6th Cir. 1976), cert. denied, 431 U.S. 967 (1977); United States v. Daly, 481 F.2d 28, 30 (8th Cir.), cert. denied, 414 U.S. 1064 (1973).

As to the contention that the income tax conflicts with his religion: the First Amendment does not relieve the appellant of his obligation to pay regardless of the fact that he is sincere about his religious beliefs. See United States v. Carroll, 567 F.2d 955, 957 (10th Cir. 1977).

Appellant's right to counsel was not violated, first, because he is not entitled to have a lay person come into court as his representative. See United States v. Wright, supra, at 3-4; United States v. Afflerbach, 547 F.2d 522, 525 (10th Cir. 1976), cert. denied, 97 S. Ct. 1118 (1977). No evidence as to the incompetence of the retained lawyer is offered. He does state, however, that the lawyer was later disbarred, but this does not mean that he was incapable of representing the defendant at the time of the instant trial. See United States ex rel. Ortiz v. Sielaff, 542 F.2d 377, 380 (7th Cir. 1976).

The argument that the oath taken by the jurors did not comply with the Constitution must be rejected because the constitutional provision relies upon is not applicable.

The reason why there was a disproportionate number of Cheyenne residents on the jury panel is that a number of those called were excused because of the great distances from the place of holding court. This is a factor which is recognized by the applicable statute as an excuse for not serving. See United States v. Test, 550 F.2d 577, 594-95 (10th Cir. 1976 (en banc); 28 U.S.C. § 1863(b)(7). In any event, it was not shown that the number of government employees on the panel was disproportionate to the general population nor that the nongovernment

employees were an underrepresented group and there was an unfair cross section under the statute and under United States v. Test, supra. Moreover, there was no intentional discrimination shown. See Swain v. Alabama, 380 U.S. 202, 204-09 (1965).

We are of the opinion that the definition of intentional conduct applicable to this particular offense was correct. Our decisions so hold. See United States v. Afflerbach, 547 F.2d 522, 524 (10th Cir. 1976), cert. denied, 97 S. Ct. 1118 (1977); United States v. Dowell, 446 F.2d 145, 147 (10th Cir.), cert. denied, 404 U.S. 984 (1971).

The judgment of the district court is affirmed.

MARCH TERM - April 10, 1978

Before The Honorable Oliver Seth, Chief Judge
The Honorable William J. Holloway, Jr., Circuit Judge
The Honorable Robert H. McWilliams, Circuit Judge
The Honorable James E. Barrett, Circuit Judge
The Honorable William E. Doyle, Circuit Judge
The Honorable Monroe G. McKay, Circuit Judge
The Honorable James K. Logan, Circuit Judge

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 77-1366
	)	
HUGH R. JOHNSON,	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc filed by appellant.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges McWilliams, Barrett and Doyle.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Howard K. Phillips

HOWARD K. PHILLIPS / Clerk

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